BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

1. The Composite Rule of the Ithaca Trust and Merchants Bank Cases is That the Value of Charitable Gifts in Remainder Should be Determined on a Factual Basis.

The fundamental and important question presented by this petition is whether under the decisions in the *Ithaca Trust Company* case and the *Merchants National Bank* case, the mere existence of a power to invade *corpus*, like that involved in the present case, precludes the valuation of the remainder interests although it is as certain upon an examination of the facts, as is anything in human affairs, that the *corpus* will not be invaded.

The Circuit Court of Appeals for the First Circuit in deciding this case gave an affirmative answer to that question, holding that the mere existence of such a power is conclusive and makes all other facts bearing on the probability of invasion of the *corpus* irrelevant.

The Circuit Courts of Appeals for the Fourth and the Ninth Circuits have given a negative answer to that question, holding that the extent of a power is merely one of the facts to be considered and that all other facts bearing on the probability of invasion of *corpus* are relevant.[1]

The First Circuit Court appears to have assumed that this Court has adopted the very strict ruling of the First Circuit on this question as exemplified in the Circuit Court's opin-

---

[1] *Commr.* v. *Robertson*, CCA4, 141 F. 2d 855.
Commr. v. *Wells Fargo*, CCA9, 145 F. 2d 130.
Although in the *Robertson* and *Wells Fargo* cases the terms of the powers are not identical with the words used in the power in this case, it is difficult to see how either of them, or particularly the power in the *Robertson* case, can be substantially distinguished from that in the instant case. The phrase "best interests" in the *Robertson* case does not impose any precise limit

ions in *Gammons* v. *Hassett*, 121 F. 2d 229, and in the *Merchants National Bank* case, 132 F. 2d 483.

No other Circuit Court has accepted or applied such a harsh rule either before or since the *Merchants Bank* case.[5]

It is submitted that the views of the other Circuit Courts of Appeal are sounder than that of the First Circuit Court and that the decisions of the Fourth and Ninth Circuit Courts correctly construe the decision in the *Merchants National Bank* case as merely holding that the power to invade *corpus* involved in that case when taken together with the other facts in that case bearing on the probability of invasion, precluded a finding of fact that there was no probability of invasion.

The view adhered to by the Circuit Court of Appeals in the present case involves holding that the trustees of an estate of over $1,500,000, charged with making annual payments of $12,000 to the widow and $6,000 each to an aged mother and a sister, with an available annual income of $100,000, might under the power in the will, have invaded *corpus* to such an extent that there would have been less than $171,000 left for the payment of the ten charitable pecuniary bequests, although such an invasion would have made impossible the specific income payments required by the will, and in view of the uncertain duration of the widow's life might have seri-

---

on the trustee's discretion. Clearly the theory of determining the questions as questions of fact, as applied in the *Robertson* and *Wells Fargo* cases, is inconsistent with the theory of determining the question as one of law, as applied in this case.

In the *Robertson* case the Court said per Soper, J., "Notwithstanding this decision (*Merchants Bank* case), we think the conclusions of the Tax Court in the pending case, resting as they do upon a finding of fact, must be affirmed."

[5] *Hartford Conn. Trust* v. *Eaton*, CCA2, 36 F. 2d 710.
First National Bank v. *Snead*, CCA5, 24 F. 2d 186.
Lucas v. *Mercantile Trust Co.*, CCA8, 43 F. 2d 39.
Commr. v. *Bank of America*, CCA9, 133 F. 2d 753.
Commr. v. *Robertson*, CCA4, 141 F. 2d 855.
Commr. v. *Wells Fargo*, CCA9, 145 F. 2d 130.

ously jeopardized the very comfort which the testator sought to insure. It is submitted that this Court, in deciding the *Merchants Bank* case, did not lay down a rule requiring such a result.

The true rule should be one of reasonable judgment upon all the facts, and such a rule results from a reconcilement of the *Ithaca Trust Company* and *Merchants National Bank* cases.

Such a result is also desirable as consistent with the purpose of Congress to benefit charities through the application of Sec. 812 (d) of the Revenue Code. The deduction allowed by this section should stand or fall upon something more substantial than literal technicalities evolved *in vacuo* divorced from the underlying and important facts.

Until the conflicting views of the Circuit Courts of Appeal are harmonized, the charities in the First Circuit are in a distinctly less advantageous position than those in other Circuits.

2. The Tax Court Should be Permitted and Required to Decide Upon the Facts, the Deductibility of Charitable Bequests.

Recently much emphasis has been laid upon the true and intended function of the Tax Court as a final arbiter in tax disputes.[8]

---

[8] *Dobson* v. *Commissioner*, 320 U. S. 492.
Bingham Trust v. *Commissioner*, 325 U. S. ——, 65 Sup. Ct. 1232.
Kelley Co. v. *Commissioner* No. 36
Talbot Mills v. *Commissioner* No. 47 } Sup. Ct., Dec. Jan. 7, 1946.

If the Tax Court is to fulfill its proper function it should not be restricted by this Court in its treatment of essentially factual problems.

The issue presented in this case, the valuation of a remainder interest under a will, is basically an issue of fact and should be decided by the Tax Court as a fact upon a consideration of all the evidence. Such procedure prevailed up to the time of the *Merchants National Bank* case (supra, p. 9 n. 3). The Tax Court now apparently considers its long practice completely reversed as disapproved by this Court.[4] A rule which worked so well for so long should not be lightly cast aside. It should be frankly recognized that the *Merchants National Bank* case was one of limited application and not intended to change completely the power of the Tax Court to decide similar cases upon a factual basis.

It is believed that if the Tax Court were permitted to consider the facts in this case a different result would have been reached.

3. Substantial Differences Make the Rule of the Merchants National Bank Case Inapplicable to This Case.

It is submitted that there are substantial differences between the *Merchants National Bank* case and this case which make the strict rule of the former inapplicable. These differences may be briefly summarized as follows:

a. The available income here is greatly in excess of that in the *Merchants National Bank* case.

b. The life tenant in the *Merchants* case was absolutely entitled to all income, but here the life tenants are en-

---

[4] Compare, however, affirmance of Tax Court in *Commr.* v. *Robertson, supra,* on basis of Dobson case.

titled to only a portion of the income, so that there is a substantial margin and accumulation of income which is subject to the trustees' discretion and must be exhausted before *corpus* can be invaded.

c. The will here contains no expression of preference for the life tenants over the remaindermen such as was contained in the will in the *Merchants* case.

d. The will here contains, in addition to the residuary gift to charity, gifts of relatively small specific amounts which are factually certain of payment.

The presence of these important and substantial differences is believed to warrant review by this Court to determine whether the Tax Court should be required to consider all the evidence presented and on that evidence determine the factual probability that *corpus* will be invaded to such an extent as to jeopardize either the specific or residuary provisions for charity.

Respectfully submitted,

HAROLD A. ANDREWS,
STUART H. TUCKER,

Attorneys for the Petitioners.